

In the Matter of)
)
Rates for Interstate Inmate Calling Services) WC Docket No. 12-375
)

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 2016

Released: March 7, 2016

By the Commission: Commissioner Pai issuing a statement; Commissioner O’Rielly dissenting and issuing a statement.

I. INTRODUCTION

1. In this Order, we deny objections to outside counsel for Pay Tel Communications, Inc., reviewing commercially sensitive information pursuant to the *Protective Order* in this rulemaking proceeding.¹ Specifically, we deny an Application for Review filed by Securus Technologies, Inc. (Securus),² and deny substantially similar objections filed by Global Tel*Link Corporation (GTL)³ and Telmate, LLC (Telmate).⁴

II. BACKGROUND

2. The Federal Communications Commission (Commission or FCC) initiated its inquiry into inmate calling services (ICS) in 2002 by seeking comment on, among other things, cost and revenue data related to the provision of ICS, site commission payment demands made by correctional facilities, states' use of rate ceilings on local calling, and alternatives to collect calling (including the use of debit calling).⁵ In 2003, a group of inmates, inmate family and friends and inmate advocacy groups petitioned the Commission to initiate a rulemaking to specifically address the ICS market.⁶ In 2008, certain ICS

¹ See *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Protective Order, 28 FCC Red 16954 (WCB 2013) (*Protective Order*).

² Application for Review of Securus Technologies, Inc. (DA 14-1432), WC Docket No. 12-375 (filed Oct. 30, 2014) (Securus AFR).

³ Global Tel*Link Corporation Objection to Disclosure of Confidential Information, WC Docket No. 12-375 (filed Sept. 12, 2014) (GTL Objection); Letter from Chérie R. Kiser, Counsel to Global Tel*Link Corporation to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 3 (filed Oct. 6, 2014) (GTL Supplemental Objection).

⁴ Telmate, LLC Objection to Disclosure of Confidential Information, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (filed Sept. 12, 2014) (Telmate Objection).

⁵ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3276-79, paras. 73-79 (2002).

⁶ See generally *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (filed Nov. 3, 2003). The same petitioners filed an alternative rulemaking petition in 2008. See also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007).

providers placed in the record a cost study that quantified their interstate ICS costs.⁷ In December 2012, the Commission adopted a notice of proposed rulemaking seeking comment on proposals that had been filed regarding rate caps and possible variations on the rate caps, and generally on ways of regulating ICS rates based on the costs of providing ICS.⁸

3. On September 26, 2013, the Commission released the *Inmate Calling Report and Order and FNPRM*.⁹ There, “[t]o enable the Commission to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates as well as to inform [its] evaluation of other rate reform options,” the Commission adopted a one-time mandatory data collection (Mandatory Data Collection or Collection), requiring ICS providers to submit data regarding the costs of providing ICS.¹⁰ The Commission stated that this data would “guide [it] as it evaluates the next steps in the Further Notice.”¹¹ The Commission stated that the next steps it would evaluate included alternate methods of achieving reforms, further reforms and rate caps,¹² as well as any other methods of ensuring that ICS rates are just, reasonable and fair. The Commission stated that the data should be based on the providers’ most-recent fiscal year data, and that it would provide parties to this rulemaking proceeding the “opportunity to comment on the data after it is submitted, provided that they abide by any relevant protective order, or other requirements, adopted in this docket.”¹³ The Commission delegated to the Wireline Competition Bureau (Bureau) “the authority to adopt a template for submitting the data and provide instructions to implement the data collection.”¹⁴

⁷ See generally Don J. Wood, *Inmate Calling Services Interstate Call Cost Study* (WOOD & WOOD 2008), CC Docket No. 96-128 (filed Aug. 15, 2008); Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Aug. 22, 2008) (attaching supplemental cost and usage data); record submission by “several providers of inmate telephone service,” CC Docket No. 96-128 (filed Oct. 15, 2008) (amending supplemental cost and usage data).

⁸ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16636-43, paras. 15-37 (2012). The Notice also incorporated relevant comments, reply comments and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375.

⁹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (*Inmate Calling Report and Order and FNPRM* or *Order*), *pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014); *pets. for review pending sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases).

¹⁰ *Id.* at 14172, para. 124. Specifically, we required all ICS providers to provide data to document their costs for interstate, intrastate long distance and intrastate local ICS for the then past year. *Id.* at para. 125.

¹¹ *Id.* at 14173, para. 126.

¹² *Id.* at 14181-82, paras. 153-54.

¹³ *Id.* at 14172, para. 124 n.434.

¹⁴ *Id.* at 14173, para. 126. On November 14, 2013, several parties, including Securus and GTL, filed petitions for review of the *Inmate Calling Report and Order and FNPRM* with the United States Court of Appeals for the D.C. Circuit. (Telmate did not file an appeal but filed a petition to intervene.) The court granted a stay of three of the rules adopted in the *Order and FNPRM*, but otherwise left the *Order and FNPRM* and rules intact, and thereafter held the petitions in abeyance while the Commission addressed the *FNPRM*. *Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014). The following rules were stayed pending resolution of the appeal of the 2013 *Order*: 47 C.F.R. §§ 64.6010 (Cost-Based Rates for Inmate Calling Services), 64.6020 (Interim Safe Harbor), and 64.6060 (Annual Reporting and Certification Requirement). As is relevant here, the Mandatory Data Collection was not stayed, nor did the parties raise as issues in their appellate briefs following the *Inmate Calling Report and Order and FNPRM* either the Collection or the decision to make the data from the Collection available to participants in the proceeding pursuant to a protective order.

4. On December 19, 2013, the Bureau released the *Protective Order* to accommodate the filing of and review of confidential data filed in response to the Mandatory Data Collection.¹⁵ That *Protective Order* is substantially similar to the protective orders the various Bureaus have adopted in the last 15 years. In the *Protective Order*, the Bureau stated that it “is mindful of the sensitive nature of [confidential filings but is] also mindful of the right of the public to participate in this proceeding in a meaningful way.”¹⁶ It concluded that the procedures it was adopting “give appropriate access to the public while protecting proprietary and confidential information from improper disclosure, and that the procedures thereby serve the public interest.”¹⁷ The *Protective Order* allows Counsel and Outside Consultants, as those terms are defined in the *Protective Order*, and their staffs, to access confidential data filed in this proceeding if they submit an Acknowledgment of Confidentiality¹⁸ in which they acknowledge and agree to be bound by the terms of the *Protective Order* and certify that they are not involved in “Competitive Decision-Making” as defined in the *Protective Order*.¹⁹ The *Protective Order* contains several restrictions to protect the submitting parties’ confidential information. People reviewing confidential information pursuant to the *Protective Order* may use that information solely for the conduct of this proceeding,²⁰ and they may share the information only with others who are similarly permitted to review confidential information pursuant to the *Protective Order* and have filed an Acknowledgment of Confidentiality.²¹ Finally, as is relevant here, paragraph five of the *Protective Order* provides that any Submitting Party may object to the disclosure of its Confidential Information to a particular person who wishes to review the information. No party filed a petition for reconsideration or an application for review with respect to the *Protective Order*.

5. On August 6, 2014, pursuant to paragraph five of the *Protective Order*, Securus objected to a request from outside counsel to Pay Tel Communications, Inc. (Pay Tel), Marcus Trathen and Timothy Nelson, to review Securus’s unredacted Cost Study Documents.²² Pay Tel filed a reply;²³ Securus supplemented its objection,²⁴ and Pay Tel filed a supplemental reply.²⁵

¹⁵ On June 17, 2014, the Bureau announced that the Commission had received the necessary approval from the Office of Management and Budget for the Mandatory Data Collection, and that the data were due to be filed by July 17, 2014. *Commission Announces Inmate Calling Services Data Due Date*, WC Docket No. 12-375, Public Notice, 28 FCC Rcd 7326 (WCB 2014). The deadline for data submissions was subsequently extended to August 18, 2014. *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order, 29 FCC Rcd 8316 (WCB 2014).

¹⁶ See *Protective Order*, 28 FCC Rcd at 16954, para. 1.

¹⁷ *Id.*

¹⁸ See *Protective Order*, 28 FCC Rcd at 16960, Appx. A.

¹⁹ *Id.* at 16954-55, para. 2 (“‘Competitive Decision-Making’ means a person’s activities, association, or relationship with any of its clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party.”).

²⁰ *Id.* at 16957, para. 7.

²¹ *Id.* at para. 8.

²² Securus Technologies, Inc. Objection to Disclosure of Confidential Information, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (filed Aug. 6, 2014) (Securus Objection). Pay Tel’s counsel had previously filed Acknowledgments of Confidentiality in this docket. See Letter from Timothy G. Nelson, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Jan. 17, 2014); Letter from Timothy G. Nelson, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 31, 2014).

Securus stated that it was willing to provide the information to Pay Tel’s outside economist “upon resolution of this dispute.” Securus Objection at 1, 4. Securus did so after an informal telephone conversation among Securus’s counsel, Pay Tel’s counsel and Commission staff. See Securus AFR at 3.

6. On October 1, 2014, the Bureau adopted an order in which, after carefully analyzing the parties' respective arguments, it denied Securus's objection and ordered Securus to provide the confidential data to Pay Tel's outside counsel.²⁶ Securus did not provide the data, instead electing to file an Application for Review with the Commission on October 30, 2014;²⁷ Pay Tel filed its response on October 6, 2014;²⁸ and Securus filed a Reply on November 24, 2014.²⁹ On September 12, 2014, GTL filed an objection to "the request of counsel for Pay Tel Communications, Inc." to review GTL's confidential data pursuant to the *Protective Order*.³⁰ Telmate filed a similar objection the same day.³¹ GTL filed a supplemental objection on October 6, 2014.³² Those objections have not been ruled on to date and we address them for the first time here.

7. On November 5, 2015, the Commission released its Second Report and Third Further Notice of Proposed Rulemaking in this proceeding.³³ On December 22, 2015, the Bureau announced the effective dates for the Second Report and Order and the due dates for filing comments and reply comments in response to the Further Notice of Proposed Rulemaking.³⁴ Further, petitions for review have recently been filed in the United States Court of Appeals.³⁵ Access to the confidential information in the record by Pay Tel's outside counsel is therefore still at issue.

III. DISCUSSION

8. Securus, GTL and Telmate (the Objectors) describe themselves as the primary providers of inmate calling services in the United States, earning 90% of the industry's revenues in 2014.³⁶ They

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²³ Pay Tel Communications, Inc. Response to Securus Technologies, Inc.'s Objection to Disclosure of Confidential Information, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (filed Aug. 8, 2014) (Pay Tel Response).

²⁴ Securus Technologies, Inc. Reply in Support of Objection to Disclosure of Confidential Information, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (filed Aug. 15, 2014) (Securus Objection Reply).

²⁵ Pay Tel Communications, Inc. Supplemental Response to Securus Technologies, Inc.'s Objection to Disclosure of Confidential Information, WC Docket No. 12-375 (filed Aug. 6, 2014) (Pay Tel Supplemental Response).

²⁶ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order, 29 FCC Rcd 11700 (Wireline Comp. Bur. 2014) (*Bureau Order Denying Securus Objection*).

²⁷ Securus AFR. The Application for Review was filed pursuant to section 1.104 of the Commission's rules, 47 C.F.R. § 1.104.

²⁸ Pay Tel Communications, Inc. Opposition to Securus Technologies, Inc.'s Application for Review, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (filed Nov. 13, 2014) (Pay Tel Opposition).

²⁹ Securus Technologies, Inc. Reply in Support of Application for Review (DA 14-1432), *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (filed Nov. 24, 2014) (Securus Reply).

³⁰ GTL Objection.

³¹ Telmate Objection.

³² GTL Supplemental Objection.

³³ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) (*2015 ICS Order*).

³⁴ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 30 FCC Rcd 14507 (WCB 2015).

³⁵ Petition for Review, *Global Tel Link v. FCC*, D.C. Cir. No. 15-1461 (filed Dec. 18, 2015); Petition for Review, *Securus Techs., Inc. v. FCC*, D.C. Cir. No. 15-1498 (filed Dec. 28, 2015).

³⁶ Letter from Chérie R. Kiser, Counsel to Global Tel*Link Corp., Stephanie A. Joyce, Counsel to Securus Technologies, Inc., and Daniel A. Broderick, Counsel to Telmate, LLC, to Chairman Tom Wheeler, Commissioner

(continued...)

have actively participated in this docket, for example, filing what they term a consensus proposal seeking to resolve the issues before us.³⁷ Pay Tel is also an ICS provider and competes against the Objectors. We first discuss and reject the objections raised to the particular outside counsel Pay Tel has chosen, agreeing with the Bureau that they are not involved in competitive decision-making and are therefore eligible to review confidential information pursuant to the *Protective Order*. We then discuss and reject the objections the three Objectors have raised to any counsel for Pay Tel, regardless of the identity of that counsel, reviewing their cost information under the *Protective Order*.

A. Particular Objections to Marcus Trathen and Timothy Nelson

9. We first turn to the specific objections lodged against Marcus Trathen and Timothy Nelson, attorneys with the law firm Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., who represent Pay Tel. Pursuant to the *Protective Order*, only counsel and outside consultants or experts who are not engaged in competitive decision-making may review the confidential information submitted in this proceeding. We agree with the Bureau that the record shows that neither attorney is engaged in competitive decision-making and so each is entitled to review confidential information pursuant to the strictures of the *Protective Order*.

10. In its Application for Review, Securus repeats its assertion that Pay Tel is a small company with no in-house counsel and therefore that the outside counsel representing it in this proceeding, Mr. Trathen, is “not so distanced from Pay Tel as the outside counsel to other companies may be.”³⁸ Securus also states that Mr. Trathen represented himself to be Pay Tel’s General Counsel, and that whether or not that is correct, “that state of mind is indicative of the relationship.”³⁹ In its objection, Telmate supplies no evidence of its own, but quotes the assertions made in Securus’s original objection – that Pay Tel has only 20-49 employees and has no in-house attorneys; and that Mr. Trathen apparently acts as Pay Tel’s General Counsel, has introduced himself as such, and has represented Pay Tel in a host of matters for at least seven years.⁴⁰ For these reasons, Telmate “worries that Pay Tel’s counsel is closer to the competitive decision-making process than are other outside counsel.”⁴¹ GTL, in its objection, states only that “it is evident from [the law firm] Brook Pierce’s long-standing and exclusive representation of Pay Tel that it plays an important role in the company’s Competitive Decision-Making process.” GTL cites a newspaper article that quotes Mr. Trathen with respect to this proceeding; GTL also cites to Notices of Ex Parte Presentations submitted in this docket by Mr. Trathen.⁴²

11. In response to the objections, Pay Tel filed a sworn declaration by its President, Vince Townsend, that neither Marcus Trathen nor Timothy Nelson, the attorneys in question, “represent Pay Tel or provide counsel to Pay Tel with respect to competitive decision-making within the meaning of the Protective Order issued in this proceeding.”⁴³ Mr. Townsend’s declaration further states that “Mr. Trathen is not, and has never been, engaged by Pay Tel as Pay Tel’s General Counsel,” and that Pay Tel

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Mignon Clyburn, Commissioner Jessica Rosenworcel, Commissioner Ajit Pai and Commissioner Michael O’Rielly, WC Docket No. 12-375 (filed Oct. 15, 2015).

³⁷ See Letter from Brian D. Oliver, Chief Executive Officer, Global Tel*Link Corp., Richard A. Smith, Chief Executive Officer, Securus Technologies, and Kevin O’Neil, President, Telmate, LLC to Chairman Tom Wheeler, Chairman, FCC, WC Docket No. 12-375 (filed Sept. 15, 2014).

³⁸ See Securus AFR at 5-6; see also Securus Objection Reply at 2.

³⁹ Securus Reply at 2.

⁴⁰ See Telmate Objection.

⁴¹ *Id.* at 4.

⁴² GTL Objection at 7.

⁴³ Pay Tel Supplemental Response, Declaration of Vince Townsend, para. 3.

employs additional counsel for corporate, litigation and patent matters.⁴⁴ Rather, Mr. Townsend declares, Trathen provides counsel to and represents Pay Tel on state and federal (FCC) regulatory matters.⁴⁵

12. Based on the record before us, we agree with the Bureau's finding that neither Marcus Trathen nor Timothy Nelson are involved in Competitive Decision-Making, as defined by the *Protective Order*, on behalf of Pay Tel. Pay Tel's President has filed a sworn affidavit that Mr. Trathen is not General Counsel for Pay Tel, that Pay Tel employs several outside counsel with respect to various aspects of its business, and that Mr. Trathen does not engage in Pay Tel's competitive decision-making.⁴⁶ Mr. Trathen and Mr. Nelson have also both filed Acknowledgments stating that they do not engage in competitive decision-making for Pay Tel. Neither Securus nor the other Objectors has provided any evidence to the contrary.⁴⁷ Unsupported "worries" and the long-standing representation of a client are not evidence of involvement in competitive decision-making. We therefore find that the record overwhelmingly supports the fact that Mr. Trathen and Mr. Nelson are not engaged in competitive decision-making on behalf of Pay Tel and that they are entitled to review confidential information pursuant to the *Protective Order*.⁴⁸

13. We reject the argument made by the Objectors that advocating for a client in front of the Commission is, by virtue of that participation, engaging in competitive decision-making, even if that representation is long-standing.⁴⁹ Representing clients before a regulatory agency in a proceeding is not by itself providing advice about or participating in the business decisions of the client. And while counsel and experts may discuss the issues involved in this proceeding with persons who are engaged in competitive decision-making and, indeed, probably must do so to represent their clients adequately, the fact that competitive decision-makers are sharing information with regulatory counsel does not mean that the converse is occurring, *i.e.*, that regulatory counsel are sharing information with the decision-makers. Mr. Trathen and Mr. Nelson have signed Acknowledgments certifying that they will not improperly share confidential information and there is no more reason to believe they will do so in these circumstances than in any other. Indeed, counsel are entrusted with the confidential business information of their clients on a daily basis.

14. Moreover, upholding such an objection would be completely unworkable. Accepting the argument would mean that no counsel representing a client before the FCC on general matters could participate in this proceeding. This would be especially burdensome on smaller providers who may have limited or no in-house lawyers. But the argument actually goes further. GTL argues that using confidential information obtained under the *Protective Order* to advocate for their client is itself to engage in competitive decision-making.⁵⁰ We find this argument to be untenable. The very point of a

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ We note that the *Protective Order* does not bar those inside counsel who are not involved in competitive decision-making from reviewing confidential information. See *Protective Order*, 28 FCC Rcd at 16954-55, para. 2 (definition of counsel) and Acknowledgment. Thus, even were Mr. Trathen general counsel for Pay Tel, he would not be disqualified on that basis alone.

⁴⁷ In its Reply before the Bureau, Securus alleged without any supporting evidence that Marcus Trathen "has introduced himself publicly" as Pay Tel's General Counsel. Securus Objection Reply at 2. In a supplemental reply, Pay Tel stated "The undersigned Outside Counsel is not aware of any instance where he has identified himself as Pay Tel's 'General Counsel' and expressly disavows that he serves in such a capacity. Pay Tel Supplemental Response at 2 n.4. Securus is therefore incorrect that its statement, Securus AFR at 5, that Marcus Trathen "has identified himself as 'General Counsel' to Pay Tel on occasion" is an undisputed fact.

⁴⁸ Contrary to Securus's arguments, we find nothing unique about this proceeding that would require us to apply a different standard in this case. See *infra* para. 19.

⁴⁹ See GTL Objection at 7; see also Securus Objection at 2.

⁵⁰ GTL Supplemental Objection at 3.

protective order is to allow parties to use confidential information to advocate for their interests in a proceeding. According to the “Catch-22” logic of GTL’s argument, anyone who wishes to make arguments about the confidential information cannot have access to them. Indeed, if we accepted GTL’s argument, no use of confidential information would ever be permitted.

B. Objections to the Review of Information by Counsel Pursuant to the *Protective Order*

15. Securus, GTL and Telmate also object to Pay Tel’s outside counsel reviewing confidential information pursuant to the *Protective Order* on grounds independent of whether or not they are involved in competitive decision-making. Essentially, they argue that Commission precedent requires that the Bureau weigh not the interest of Pay Tel or other parties to the proceeding to review the confidential information at issue, but rather the separate interest of counsel to do so. The three Objectors do not argue that no one should be permitted to review their information. Indeed, all three have provided their information to Pay Tel’s outside consultant and both Securus and GTL have sought and received confidential information themselves (delivered to their consultants). Instead, they argue that *counsel* should not be permitted to review the confidential information contained in the record and on which the Commission has now based its decision, although GTL’s appellate counsel has since sought and received an unredacted copy of the Commission’s 2015 ICS Order which contains confidential cost information of other parties, as have outside counsel for another party.

1. The Objectors’ arguments are untimely

16. Insofar as the Objectors are arguing that in the *Protective Order*, the Bureau should have limited access to the data to only outside consultants, their argument is untimely and we dismiss it on those grounds. The *Protective Order* was adopted by the Bureau on December 19, 2013. The *Protective Order* provides that confidential information may be reviewed by both counsel and outside consultants to a participant in this proceeding.⁵¹ If the Objectors wished to limit the types of people who could review their information pursuant to that *Protective Order* (e.g., not allowing counsel to review the information), or otherwise objected to the *Protective Order*’s provisions (which follow the Commission’s standard protective orders),⁵² they should have filed a petition for reconsideration with the Bureau or an application for review of the *Protective Order* with the Commission. They did neither. Accordingly, we find that any general objections to the review of information by individuals pursuant to the *Protective Order* are untimely, and dismiss Securus’s Application for Review and GTL’s and Telmate’s objections on this ground.⁵³

⁵¹ *Protective Order*, 28 FCC Rcd at 16960, Appx. A. Among other things, it allows for inside counsel who are not engaged in competitive decision-making to review the Objectors’ cost information. *Id.* at 16954, para. 2 (definition of counsel) and Acknowledgment.

⁵² See, e.g., GTL Supplemental Objection at 2 (“GTL, however, has significant concerns about the disclosure of its confidential information to outside counsel for its competitors even under the safeguards afforded by the *Protective Order*.”) (footnote omitted).

⁵³ The Objectors were on notice far earlier that their confidential information would be made available pursuant to a protective order. The *Inmate Calling Report and Order and FNPRM*, which was adopted on September 26, 2013, specifically stated that “parties will have an opportunity to comment on the data” submitted in response to the Mandatory Data Collection “provided that they abide by any relevant protective order, or other requirements, adopted in this docket.” *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14172 para. 124 n. 434. By requiring the ICS providers to submit their information pursuant to a one-time Mandatory Data Collection, and by allowing review of that data pursuant to a protective order, the Commission clearly was not following the prior course of dealing by various ICS providers whereby seven of them voluntarily submitted their cost data to a third-party who then provided a report to the Commission, see *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14112, n.30, as the Objectors now urge the Commission to do. And while various ICS providers judicially appealed the *Inmate Calling Report and Order and FNPRM*, none of their arguments relate to the review of their responses to the Mandatory Data Collection pursuant to a protective order.

2. The Objectors' arguments are incorrect

17. Independently of whether they have been timely raised, we reject on the merits any arguments against the review by outside counsel pursuant to the *Protective Order* of the responses to the Mandatory Data Collection or of other competitively sensitive information, in particular, unredacted copies of the Commission's 2015 ICS Order. And insofar as the Objectors are arguing that the *Protective Order* and Commission precedent required the Bureau to engage in the balancing exercise they propose, they are incorrect and we reject those arguments as well.

18. The Objectors spend much of their objections arguing that their cost data is confidential and of the type the Commission typically does not release to the public, and that release of the information would harm them competitively.⁵⁴ Pay Tel does not disagree,⁵⁵ and the *Inmate Calling Report and Order and FNPRM* states that the information filed in response to the Mandatory Data Collection will be treated as confidential.⁵⁶ The question here, however, is who may review that confidential information pursuant to the *Protective Order*. And we note that, contrary to some of the Objectors' arguments,⁵⁷ allowing review pursuant to a protective order is neither releasing that information to the public nor sharing it with the Objectors' competitors.

19. Securus also argues that this proceeding is unique with respect to confidential information.⁵⁸ We disagree. The fact that the members of the ICS industry do not share cost information⁵⁹ is hardly unusual. In fact, depending on the circumstances and how it occurs, sharing cost data among members of an industry could very well be a violation of the nation's antitrust laws. Further, if cost information were shared, a protective order would be unnecessary. The fact that cost information is not shared is not a reason against allowing review pursuant to the *Protective Order*; it is a reason to adopt the *Protective Order* in the first instance. Securus also complains⁶⁰ that Pay Tel is not following the process many ICS providers followed in 2008, where seven of them provided their information to a third-party and voluntarily filed a report with the Commission.⁶¹ The previous manner in which ICS providers agreed to provide information to the Commission, independent of a formal Commission request, and prior to the adoption of the *Protective Order* which now governs the use of confidential information in this proceeding, or the Mandatory Data Collection, is irrelevant at this time. The Commission required ICS providers to submit cost information and has provided access to the information in this rulemaking proceeding pursuant to the *Protective Order*. The Bureau was correct to not give any weight to "the parties' prior, very amiable, course of dealing with regard to cost data,"⁶² in deciding whether Pay Tel's counsel was entitled to review the cost data received in response to the Mandatory Data Collection pursuant to the *Protective Order*.

⁵⁴ See Securus AFR at 4-6; GTL Objection at 1-5, 7-10; GTL Supplemental Objection at 2; Telmate Objection at 2-3.

⁵⁵ See, e.g., Pay Tel Communications, Inc. Response to Telmate, LLC's Objections to Disclosure of Confidential Information, WC Docket No. 12-375 (filed Oct. 6, 2014).

⁵⁶ *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14172, para. 124. We clarify that if ICS providers seek confidential treatment of their data, they must file it pursuant to the *Protective Order*. ICS providers are, of course, free to not seek confidential treatment and to file the information publicly and some providers have done so.

⁵⁷ See, e.g., GTL Objection at 7; Telmate Objection at 2.

⁵⁸ See, e.g., Securus AFR at 4, Securus Reply at 1.

⁵⁹ See Securus AFR at 4-5; Securus Reply at 1.

⁶⁰ Securus AFR at 4-6; Securus Reply at 3.

⁶¹ See *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14112, para. 9 n.30.

⁶² Securus AFR at 6.

20. More to the point, the Objectors argue that the Commission's "historical balancing test" involves considering the need of a particular representative of a party (as opposed to the need of the party) to review confidential information under a protective order.⁶³ They argue that the Bureau should have examined not whether Pay Tel needs access to the information at issue, but whether Pay Tel's outside counsel does.⁶⁴ In their view, it was sufficient for Pay Tel to have its outside expert be able to review the information contained in the record.⁶⁵

21. None of the Objectors cite precedent for this argument and there is none. As we recently explained,⁶⁶ the Commission has long recognized that the handling of confidential information requires the Commission to balance the concerns of the parties submitting information; the interest of the public in accessing that information;⁶⁷ and the Commission's interest in reviewing all relevant evidence and hearing all relevant views in order to best determine the public interest. We recognize that even where information is relevant and material to the issues before us, the competitive injury posed by widespread public disclosure may outweigh the public benefits of disclosure.⁶⁸ In such cases, as the Commission has stated on numerous occasions, disclosure under a protective order serves the dual purpose of protecting competitively sensitive information while still permitting a limited disclosure for a public purpose.⁶⁹

22. Once the Commission (or a Bureau) has performed this balancing and issued a protective order, then anyone who satisfies the terms of the protective order is permitted to review the information.⁷⁰ An individual seeking access pursuant to the requirements of the protective order does not need to make any additional showing and the Commission does not perform an additional balancing of interests. The Commission has never prohibited a representative of a party from reviewing information under a protective order because review by that particular person was deemed cumulative. To the contrary, the Commission previously rejected arguments that it should limit access under a protective order to a certain number of people, with various sublimits.⁷¹ As it stated, such limitations may "unreasonably preclude a

⁶³ See Securus AFR at 6-7; Securus Reply at 4-5; GTL Objection at 6-7.

⁶⁴ See GTL Objection at 6-7; Telmate Objection at 4-5.

⁶⁵ None of the Objectors object to review of their confidential information by Pay Tel's expert, who, we note, they previously employed. See Securus Application for Review at 3, 6; GTL Objection at 2; Telmate Objection at 4-5. Further, both Securus and GTL have sought confidential information to be reviewed by their own experts. See, e.g. Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Jan. 14, 2015); Letter from Cherie R. Kiser, Counsel for Global Tel*Link Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 29, 2014).

⁶⁶ *Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, 30 FCC Rcd 10360, 10365, para. 12 (2015), petitions for reconsideration pending (*Charter Communications Order Adopting Protective Order*).

⁶⁷ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24824-25, para. 10 (1998) (*Confidential Information Policy Statement*).

⁶⁸ See *Confidential Information Policy Statement*, 13 FCC Rcd at 24824, para. 9; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2213, para. 91 (and cases cited therein) (1997) (*Streamlined Tariff Filing Order*).

⁶⁹ See *Confidential Information Policy Statement*, 13 FCC Rcd at 24824, para. 9; *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2213, para. 91 (and cases cited therein).

⁷⁰ See *Charter Communications Order Adopting Protective Order*, 30 FCC Rcd at 10371, para. 21.

⁷¹ *Confidential Information Policy Statement*, 13 FCC Rcd at 24833, para. 26 (1998). We also think such a test would be administratively unworkable, requiring the Commission to decide multiple times in each proceeding whether the additional benefit of each individual representative of a party seeking to review confidential information would outweigh the potential harm to the submitting party, and could very well entail inquiring into the litigation strategy of participants in a proceeding. Moreover, allowing objections on these grounds would be rife for abuse

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party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine” the information. For example, such a limit could “preclude a partner in a law firm from obtaining the counsel of associates.”⁷² Moreover, we think that the proposition that *counsel* should be prohibited from reviewing the information in the record is particularly inappropriate.⁷³ It is typically counsel who are advocates for parties before the Commission, who prepare the comments and who make the arguments before the Commission, and who eventually represent the parties in court proceedings. We will not prevent or deprive parties from utilizing counsel before the Commission, or tie one hand behind counsels’ backs.

23. Securus cites three Commission decisions in support of its argument.⁷⁴ All three involve whether information should be released publicly (either pursuant to a request under the Freedom of Information Act (FOIA) or by requiring the information to be filed publicly); they do not involve protective orders. Securus argues that the difference between release to the general public and release pursuant to a protective order is a distinction without a difference.⁷⁵ We disagree. As we have previously explained, the considerations involved – and the potential harms to the parties whose information is at issue – are very different.⁷⁶ But more importantly, none of the cases involve the question whether, having balanced the interests involved and decided that confidential information should be made available to participants in a proceeding, we should perform yet an additional balancing with regard to each individual representative of a party seeking access pursuant to a protective order.

24. Similarly, GTL argues that before a particular individual may review confidential information pursuant to a protective order, he or she must make a persuasive showing as to the reasons he (as opposed to the party he represents) needs to review the information.⁷⁷ Like Securus, however, GTL cites no cases where the Commission, having balanced the interests involved and found that information was properly able to be reviewed by representatives of a party, nonetheless engaged in a further balancing to determine whether allowing review by particular individuals or categories of individuals was proper.⁷⁸

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and could allow parties to hamstring their opponents from timely filing arguments or to stretch out proceedings interminably. We have the authority “to conduct [our] proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” Sec. 4(j) of the Communications Act, 47 U.S.C. § 154(j); *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (“Congress has ‘left largely to [the Commission’s] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate’ the proper dispatch of business and the ends of justice.”) (citations omitted). We conclude that following such a procedure would not.

⁷² *Confidential Information Policy Statement*, 13 FCC Rcd at 24833, para. 26.

⁷³ We see no reason to believe that counsel, who are trained in maintaining confidences and are required by the rules of the bar to do so, and who face disbarment not just before the Commission but from the entire legal profession if they do not, would be any less trustworthy than outside consultants to not reveal the confidential information of a third-party.

⁷⁴ Securus AFR at 7 (citing *AT&T Request for Inspection of Records*, 5 FCC Rcd 2464 (1990); *Modernizing the FCC Form 477 Data Program*, 28 FCC Rcd 9887 (2013); *Rural Call Completion*, 28 FCC Rcd 16154 (2013)).

⁷⁵ Securus Reply at 4.

⁷⁶ *Charter Communications Order Adopting Protective Order*, 30 FCC Rcd at 10370 n.68, 10384-85, para. 45.

⁷⁷ GTL Objection at 6. Securus similarly argues that if the Commission did not expect there to be a further balancing, the *Protective Order* would not include a procedure for lodging objections. Securus Reply at 4.

⁷⁸ GTL’s argument that the fact that the *Protective Order* adequately protects its confidential information, GTL Objection at 7, itself “misses the mark.” Were we to find that Pay Tel’s counsel engaged in competitive decision-making, we agree that they should not be allowed to review GTL’s confidential information even though a protective order is in place. However, we find that Pay Tel’s counsel are not engaged in competitive decision-making. Moreover, GTL’s citation to *Qwest Communications Int’l v. FCC*, 229 F.3d 1172, 1184 (D.C. Cir. 2000) is inapposite. There, after ruling that the Commission had the authority to release otherwise confidential information,

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Moreover, here, GTL agrees that Pay Tel, through its outside expert, may review its confidential information,⁷⁹ and, having sought other parties' confidential information to prepare its own pleadings, apparently agrees that the confidential information is properly reviewed and used to provide comment in this proceeding.⁸⁰ We reject GTL's argument. Once a party to a proceeding is entitled to review confidential information under a protective order, an individual representative of that party, properly qualified under the protective order, is not required to make any additional showing of need before being permitted to review the information.

25. Telmate seemingly argues that the existence of an objection procedure means that if Telmate simply objects to a person, that person is not entitled to review the information.⁸¹ That argument is incorrect. The purpose of the objection procedure is to allow parties to prevent access to confidential information until the Commission can adjudicate whether the objected-to person qualifies for access to the confidential information or not. It is not to give an objecting party the power of veto.

26. Finally, Pay Tel argues that, contrary to the Objectors' arguments, its outside counsel does need access to the information at issue in order to meaningfully participate in this proceeding.⁸² As stated above, this proceeding continues. We believe that access by counsel will provide us with more meaningful comment and thereby assist our understanding and ultimate determination of the issues.⁸³ Further, access by counsel would be especially important with regard to any petitions for review or other litigation with respect to the *2015 ICS Order*. In any event, it is for Pay Tel, not its opponents, to decide how best to make its arguments in this proceedings.⁸⁴ Consistent with the general restrictions of a protective order, Pay Tel is entitled to have the representation it desires, and its outside counsel is entitled to have access to all the information it needs to zealously represent its client. Having found that Pay Tel's outside counsel are not engaged in competitive decision-making and are eligible to review information under the *Protective Order*, we reject the Objectors' arguments to prevent them from doing so.

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)-(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 155, and 303(r), the Securus Technologies, Inc. Application for Review filed on October 30, 2014 IS DISMISSED and DENIED.

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id. at 1176-80, the court remanded the case to the Commission to show why it was deviating from its precedent and statements in the *Confidential Policy Statement* that information submitted in audit proceedings, which “‘had no statutory right of public participation and have historically involved’ only the Commission and the entity being audited,” would remain completely confidential. *See id.* at 1182. This proceeding, by contrast, is a rulemaking which has a statutory right of participation and historically has not only involved the general public but has proceeded on the basis of all information being publicly available and open to comment. *See Confidential Information Policy Statement*, 13 FCC Rcd at 24843-44, paras. 43-45.

⁷⁹ *See* GTL Objection at 2. *See also* Telmate Objection at 4-5.

⁸⁰ Thus, although GTL sometimes argues that “Pay Tel” does not need GTL’s data to make its arguments, we understand GTL to be arguing only that its counsel do not. *See* GTL Objection at 6, Heading II (“II. Pay Tel’s Counsel Has Not Demonstrated A Need for GTL’s Confidential Data”); GTL Supplemental Objection at 2, (“Pay Tel’s attorneys also claim they must have access to GTL’s confidential data to respond to and ‘evaluate the Joint Proposal against the cost data submitted to the Commission.’”); *id.* at 2-3 (“... GTL respectfully requests that the Commission ... not permit outside counsel for one of GTL’s competitors to obtain access to the confidential data.”).

⁸¹ Telmate Objection at 4.

⁸² Pay Tel Opposition at 13-14.

⁸³ We note that while we just recently issued the *2015 ICS Order* resolving some of the issues before us, this proceeding still continues.

⁸⁴ *Cf. Confidential Information Policy Statement*, 13 FCC Rcd at 24833, para. 26.

28. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 5, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 155, and 303(r), the Global Tel*Link Corporation Objection to Disclosure of Confidential Information filed on September 12, 2014, and the Telmate, LLC Objection to Disclosure of Confidential Information filed on September 12, 2014 ARE DISMISSED and DENIED.

29. IT IS FURTHER ORDERED that Securus Technologies, Inc., Global Tel*Link Corporation and Telmate, LLC MUST COMPLY with the terms of the *Protective Order* in this docket and provide Outside Counsel to Pay Tel Communications, Inc. the requested confidential data no later than ten business days after release of this Order.⁸⁵

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸⁵ If a party seeks a judicial stay of this Order, the Order will be stayed until that request is acted upon. *See Charter Communications Order Adopting Protective Order*, 30 FCC Rcd at 10377, para. 31; *see also id.* at 10374, para. 26.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

This *Order* proclaims that “Pay Tel is entitled to have the representation it desires, and its outside counsel is entitled to have access to all the information it needs to zealously represent its client,”¹ that Pay Tel’s “outside counsel does need access to the information at issue in order to meaningfully participate in this proceeding,”² and that the FCC will not “tie one hand behind counsels’ backs.”³ I couldn’t agree more.

But it’s a little late for such high-minded rhetoric. For two years, Pay Tel’s outside counsel has patiently waited for access to the cost data in this proceeding.⁴ This is the cost data that the FCC demanded from inmate calling service providers in August 2013 to inform its ratemaking.⁵ This is the cost data that the FCC analyzed to propose rate caps in October 2014.⁶ And this is the cost data that the FCC used to justify rate caps in November 2015.⁷ Indeed, the FCC cited confidential data 40 separate times in its most recent order—and had to redact each citation from the public version of that order.⁸

How was Pay Tel’s outside counsel supposed to “zealously represent its client” or “meaningfully participate” in this rulemaking with “one hand [tied] behind counsels’ backs”? The *Order* offers no answer. Nor does it offer any reason for the long delay in adjudicating this dispute. Although I support today’s order—the proverb “better late than never” comes to mind—I am disturbed that we may have deprived a party of its administrative rights through inaction. That’s unacceptable and yet another troubling sign that the FCC’s processes are in desperate need of reform.

¹ *Order* at para. 26.

² *Id.*

³ *Order* at para. 22.

⁴ Both counsel signed the required acknowledgement of confidentiality in January 2014. See Letter from Timothy G. Nelson, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Jan. 17, 2014).

⁵ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14172, para. 125 (2013).

⁶ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, 13191–94, paras. 49–59 (2014).

⁷ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12788–97, paras. 50–70 (2015).

⁸ *Id.* at 12787, para. 49; *id.* at 12788, para. 49 & n.154; *id.* at 12790, n.174 (twice); *id.* at 12791, para. 55; *id.* at 12793, n.186; *id.* at 12795, para. 63 (twice) & nn.192 (twice), 194 (seven times), 195 (thrice), 196, 197 (thrice); *id.* at 12796, para. 64 (twice) & nn.198, 199, 200, 201 (twice), 202; *id.* at 12797, n.204; *id.* at 12799, n.217; *id.* at 12800, n.221; *id.* at 12801, paras. 74, 75; *id.* at 12806, n.265 (twice).

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

I dissent from this order because the Commission has not adequately considered objections by Securus Technologies, Inc., Global Tel*Link Corporation, and Telmate, LLC regarding the release of confidential data, including commercially sensitive cost data, to counsel for their competitor, Pay Tel Communications, Inc. On a larger scale, this item is interlinked to the current Commission's sometimes inattentive approach to the sensitivities surrounding critical information provided to the Commission by outside parties.

As an initial matter, the order claims that the objections are untimely because the companies should have challenged the underlying protective order. However, protective orders are adopted without notice and comment and, until recently, the Commission did not have specific procedures for challenging the terms of protective orders. Moreover, parties may not reasonably know whether they will have objections until they receive a specific request. How the general terms of a protective order will apply in a given situation may not be obvious until it happens. Presumably, that is why protective orders include provisions allowing parties to object to particular persons reviewing the protected information.

That is exactly what happened here. While the companies did not oppose providing access to Pay Tel's outside consultant, and may not have objected to requests from competitors that employ both in-house and outside counsel, they did object to review by Pay Tel's counsel based on Pay Tel's particular circumstances. Specifically, they argue that Pay Tel's outside counsel explicitly or effectively serves as its in-house counsel, meaning that there isn't the customary separation between the company and the lawyers that will review the protected information. Moreover, because of this arrangement, they argue that Pay Tel's counsel is, at the very least, closer to "Competitive Decision-Making" than an outside counsel normally would be. Especially in this proceeding, where it is argued that nearly every filing, Commission holding, and court decision has the potential to alter the competitive landscape and even put providers out of business, this seems like a credible concern, without making any comment on the professionalism of the individuals at the heart of the matter.

The order acknowledges that the purpose of the objection process is to challenge whether someone is eligible to access information under the protective order. But then the Commission should take these challenges seriously, including by looking behind the Acknowledgements of Confidentiality, where necessary, to be assured that review by certain entities is not just facially compliant but substantively appropriate. Once the information is disclosed it cannot be unremembered. Like in other instances, the bell cannot be unrung.

Furthermore, since Pay Tel's outside consultant has access, the companies argue that Pay Tel is able to meaningfully participate in the proceeding, just as it has done in the past.¹ Accordingly, they state that any additional benefit of providing access to counsel is outweighed by the substantial and irreversible competitive harm that would occur if the confidential data were disclosed even inadvertently.

The order responds that, having already balanced the concerns of parties submitting information against the interest of the public in accessing that information by adopting a protective order, the

¹ In fact, one company asserts that there was no reason to think that they would receive a request from counsel because an outside consultant – the same economist employed by Pay Tel in this latest proceeding – previously handled and reviewed confidential cost data on behalf of a number of providers.

Commission does not need to revisit that balance if specific objections are raised. In other words, the expectation is that the Commission foresaw every possible concern and adopted a foolproof protective order. I disagree with that mindset. The Commission should be open to rebalancing the interests when subsequent developments call into question whether the Commission reached the right result. Given that Pay Tel's outside consultant already has access to the information, and the companies have made credible arguments as to why Pay Tel's outside counsel should not review it, the Commission should have taken the next step to consider whether the benefits continue to outweigh the costs.